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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

J. B. ELDRIDGE,
Solicitor for Appellant.

Filed....., 1929.

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STATEMENT OF THE CASE

Two motions were made in this cause for an order permitting the appellant to file a supplemental bill in the case of Oliver Hill, et al, vs. Twin Falls North Side Land & Water Co., et al, defendants, and Robert Rogerson, et al, intervenors. The motion set out the proposed supplemental bill as grounds. (Pages 8 to 36, inclusive, Tr.).

The first motion was based upon the contents of the supplemental bill. The supplemental bill sought to be filed, among other things alleged that a bill in intervention was filed in said cause on behalf of the supplemental complainant and that supplemental complainant was the owner of a water right under stock certificates and contracts on the North Side project. That the supplemental complainant performed all the obligations on his part under said contracts for the purchase of a water right and offered to do equity. (Page 11 Tr.). That in said Oliver Hill case a stipulation for decree was entered into and decree entered thereunder, and under the terms of said decree the North Side project was limited to 170,000 shares represented by a like number of acres. This grew out of the insufficient water supply for the project and incompleted works. (See Decree, pages 23 to 26, inclusive). It is further alleged that the Land & Water Company was offering to sell 15,000 additional shares representing 15,000 additional acres to be watered on the North Side project making 185,000 acres in all, and that the canal system was, in fact, not capable of furnishing water to more than 163,080 acres. (Page 13 Tr.).

The supplemental complainant sought the relief of the court to be permitted to file a supplemental bill and that the Land & Water Company be restrained and enjoined from selling any further shares so as

to cause a division of the already inadequate water supply; and that the Land & Water Company be required to complete the irrigation system in conformity with the state contracts; and that the court appoint someone, if it be deemed expedient, to take charge of the irrigation works and complete it at the expense of the Land & Water Company so as to make it possible to deliver water to 170,000 acres as the decree called for.

The United States Court in the Oliver Hill case in its decree forming a part of a supplemental bill tendered, set out that the state contracts should be fully complied with (page 23 Tr.) which state contracts for the construction of the North Side project provided that individual contracts should be made between the water users and the Land & Water Company, and for a certificate of stock to be issued to each land owner defining the water right and interest in the system of each land owner. The individual contract, Exhibit "C" to the supplemental bill (pages 26 to 34, inclusive, Tr.), and the certificate of stock, Exhibit "D" to the supplemental bill (pages 35 to 36 Tr.), define the amount of water right to be 1-80th of a cubic foot for each acre and a proportionate interest in all of the irrigation system and works.

The Federal Court in said decree, Exhibit "B" to the supplemental bill, in addition to providing that the state contracts should be fully complied with, re-

duced the acreage to 170,000 acres and to 170,000 shares as the amount that might be sold, and made further provisions therein,

> "That if at any time in the future, the construction company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor will serve or *can be made to serve without violating the settlers' contracts* more than 170,000 acres of land, and if the construction company is then unable to agree with the said canal company as to what excess, if any, may be served, then and in that event and so often as such may be the case the construction company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined." (Page 25 Tr.).

The court further decreed:

> "That the several contracts between the State of Idaho and the construction company * * * shall be binding and of full force and effect as between all parties concerned therein." (Page 26 Tr.).

Notice was duly served and both of the defendants appeared in said cause by their counsel, Walters and Parry, and objection was made to the filing of the supplemental bill (pages 36 to 41, inclusive, Tr.) upon the grounds: First, that the court was without jurisdiction. Second, that it presents to the court a different cause of action than that set forth in the

original bill, and involved different parties than those who were parties to the original bill. Third, that McClung was not a party to the original action nor a successor in interest of any such party, and that the identical question involved was pending in a state court wherein McClung was plaintiff and the Land & Water Company and other defendants, in which it was shown that an action was filed asking to cancel the contract authorizing the sale of 15,000 additional shares of the canal company representing the water right for 15,000 additional acres. The objection was supported by an affidavit by E. A. Walters, Esquire, except as to the status of McClung, (pages 42 and 43 Tr.) to which was attached a copy of the complaint of the action pending in the District Court for Jerome County. Upon the showing made, the court rendered a memorandum decision February 6, 1928 (pages 44 to 52, inclusive, Tr.) in which the motion to file a supplemental bill was denied. The court denied the motion chiefly upon the ground that under the terms of the Federal decree in the Oliver Hill case,

> "The right was there given to the defendant company to sell and keep sold 185,000 shares of the capital stock of the canal company because the parties interested agreed to allow the company to sell and dispose of the 15,000 shares of stock in addition to the stock then sold and outstanding."

The trial court further held that the steps provided for to be taken in the decree were taken by the parties affected by the decree, and that the North Side Canal Company represented its stockholders, including McClung, in making the contract allowing the company to sell additional 15,000 shares of stock. (Page 49 Tr.). And the court further held (near the bottom of pages 50 and 51 Tr.) that the Land & Water Company and Canal Company had agreed that the irrigation system had been greatly enlarged and the capacity increased so that the additional water might be supplied "without violating the terms or provisions of the settlers' contracts." The court further held that the controversy between McClung, a stockholder of the North Side Canal Company, and the state as to whether or not the agreement of July 27, 1921, referred to, was fraudulent or unwise has no relation and is not germane to the original bill and decree, and for the foregoing reasons denied the right to file the supplemental bill. The denial was made, however, without prejudice. (Page 53 Tr.).

A new motion was filed (pages 54 to 101, inclusive, Tr.) which includes the proposed supplemental bill together with the exhibits attached to it consisting of the proposed supplemental complaint, stipulation for decree in the Oliver Hill case, the decree of the Federal Court, order of Commissioner Swendsen of the Department of Reclamation of the State of

Idaho accepting works as completed, contract between the Land & Water Company, Canal Company and the Department of Reclamation of the State of Idaho that 15,000 additional shares representing 15,000 additional acres may be sold.

The second motion being based upon the proposed supplemental bill is in the same form as that of the original supplemental bill until paragraph 15 is reached. Then it is alleged, among other things, that in order to avoid the Federal Decree in the Oliver Hill case, limiting the right to irrigate only 170,000 acres on the North Side project, and at the same time pretending to comply with it, Commissioner Swendsen fraudulently entered his order July 6, 1920, Exhibit "E", finding that the irrigation project had been completed; that this grew out of a wrongful and unlawful conspiracy between the Land & Water Company and Commissioner Swendsen. Then follows further allegations that the Land & Water Company and the North Side Canal Company and Swendsen, in pursuance of said conspiracy set out in paragraph 15, combined and conspired with each other to make the contract of July 27, 1921, Exhibit "F" to the supplemental bill, and falsely and fraudulently recited in the contract that the contract could be entered into "without violating the settlers' contracts" to the end that 15,000 additional acres might be irrigated. And falsely and fraudulently recited in said contract that the sale of additional shares,

> "Shall not be deemed in violation of the provisions of the contract between the Land & Water Company and the State of Idaho, but in compliance therewith."

and that the making of said contract should be in compliance with the decree of the Federal Court in the Oliver Hill case. And falsely and fraudulently recited that the contract may be deemed

> "A stipulation by and between the parties in said suit for the amendment of said decree as herein recited insofar as applicable."

It is further alleged in the second supplemental bill that Swendsen acted beyond the scope of his authority and in violation thereof in making said contract; that said acts and doings were false and fraudulent for the reasons set out in the supplemental bill. It is further set out that the supplemental complainant and those for whom he is acting have never given their consent to the sale of further water rights. It is further charged in the supplemental bill that the North Side Canal Company was without power or authority to further sell water rights for the reason that they were already oversold. It is further charged in the supplemental bill that in order to pacify the water users on the North Side project the settlers were induced and advised to purchase and did purchase 160,000 acre feet more of water from American Falls to augment the already short water supply for the 170,000 acres on the project.

All the allegations particularized since paragraph 15 was referred to here differ from and are in addition to those set forth in the original supplemental bill.

Objection was again made to the filing of the supplemental bill the same as made heretofore to the first supplemental bill and on the additional grounds that the Statute of Limitations had run against the decree of the court. (Pages 102 to 104, inclusive, Tr.).

The court rendered a memorandum decision (beginning at the bottom of page 104 and ending at the top of page 105 Tr.) in which the court decided that the application to file the supplemental bill should be denied for the reasons set forth in its original memorandum opinion, and so provided in its order denying the right to file the bill (bottom of page 105 to top of page 106 Tr.) to which exceptions were taken by McClung and exceptions allowed. (Page 106 Tr.) From that order an appeal was perfected to this court in which it is charged that the court erred in entering judgment or order denying the right of the supplemental complainant and petitioner to file his supplemental bill and praying for reversal. The appeal has been duly allowed, citation issued, praecipe for transcript, certificate of clerk certifying up a number of exhibits as such, to which reference will be made in the argument.

SPECIFICATIONS OF ERROR

I.

The court erred in entering judgment or order denying the right of the supplemental complainant and petitioner in said cause to file his supplemental bill therein.

II.

The court erred in denying the right of the appellant to file his supplemental bill as requested in the last petition upon the grounds set forth in the original memorandum opinion because the original memorandum opinion was not applicable to the additional state of facts set forth in the second petition.

III.

The court erred in holding and deciding that the Canal Company and the Land & Water Company had pursued the remedy provided to be pursued in the decree of the Federal Court in the said Oliver Hill case for the sale of additional shares of stock in that the petition set forth that said agreement was entered into for the very purpose of avoiding that provision of the decree of the court as result of a wrongful and unlawful conspiracy between said parties and in bad faith.

IV.

The court erred in holding and deciding that the

Canal Company and Land & Water Company could legally enter into a contract for the sale of said 15,000 additional shares while doing so as a result of a wrongful and unlawful conspiracy by means of pretending to comply with the decree of the Federal Court in said cause so as to avoid the force and effect of the same.

V.

The court erred in holding and deciding that the issues raised in the supplemental bill sought to be filed did not relate to and were not germane to the issues set forth in the original bill.

ARGUMENT

Points

The specification of errors, we believe, may be grouped under and argued in the one point.

I.

Did the court err in denying the right of the supplemental complainant to file his supplemental bill under his second petition to so do, and if so, was that denial an abuse of the discretion of the court? It is the view of the appellant that any showing that may be justifiably made in opposition to the right to file a supplemental bill like a demurrer admits all of the allegations of the proposed supplemental bill as being true and all that is required is that a probable

cause exists for granting the motion, and the merits of the proposed bill will not be determined.

Simpkins Federal Practice Law and Equity, Revised Edition, pages 638-639.

"All that the court inquires into on petition to file a supplemental bill is to see whether probable cause exists for granting the leave and whether the petition states facts or circumstances which if properly pleaded would sustain a supplemental bill."

Parkhurst v. Kingsman, 18 Fed. Cases, page 1203, No. 1075.

Oregon and Transcontinental Co. v. Northern P. R. Co., 32 Fed. 428.

The fact that it may be necessary to bring in new parties or that rights have changed by transfer of interest or that there is no longer a diversity of citizenship cannot be urged against the filing of the supplemental bill.

Root v. Woolworth, 150 U. S. 401, 37 Law Edition 1123.

Central Trust Co. New York v. Western N. C. R. Co. et al, 89 Fed. 24.

The Milwaukee & Minnesota R. R. Co. v. Chamberlain, 6 Wall. 748, 18 Law Edition 859.

Simpkins Federal Practice Revised Edition, page 640.

The supplemental bill will be allowed as readily after decree as before it.

Simpkins Federal Practice Revised Edition, page 637.

The most comprehensive and best reasoned case perhaps ever decided by any court on the subject of a right to file a supplemental bill and its functions is that of Root v. Woolworth, 150 U. S. 401, 37 Law Edition 1123, in which, among others, the following principles were settled which have been followed ever since the rendition of said decision in practically every jurisdiction in the United States, both state and federal.

FIRST: That any party to an action or successor in interest to a party have the right to file a supplemental bill where otherwise entitled.

SECOND: That a supplemental bill is available for bringing in new parties.

THIRD: That a supplemental bill will be resorted to for the enforcement of an original decree and is ancillary.

FOURTH: That persons who were not parties to the original case may avail themselves of a supplemental bill for the protection of their rights.

FIFTH: That diverse citizenship does not in any manner effect the right to file the bill.

SIXTH: That a court never loses jurisdiction to enforce its own decrees.

In the first petition no allegation was set forth of

any scheme or conspiracy being entered into for the purpose of avoiding the decree of the Federal Court in the Oliver Hill case while pretending to comply with it. (Pages 9 to 16, inclusive, Tr.). In response to which the court in denying the right to file the supplemental bill held, among other things, that he would not permit it to be filed for the reason that the parties had followed the course laid down in the decree of the court for arriving at the right to make further sales (pages 44 to 52, inclusive, Tr.) but denied the right without prejudice. (Page 53 Tr.).

A new supplemental bill was tendered (pages 55 to 67, inclusive, Tr.) in which it was set out that a wrongful and unlawful conspiracy was entered into by the defendants and the Commissioner of Reclamation of the State of Idaho in which the Commissioner of Reclamation would accept the irrigation works as completed and in which a contract was made for the sale of 15,000 additional shares representing 15,000 additional acres of land, to which was attached the contract sought to be canceled by the action pending in the state court by D. L. McClung and others, and that said contract and the acceptance of the irrigation works was made for the very purpose of avoiding the force and effect of the federal decree in the Oliver Hill case while pretending in bad faith to comply with it; all of which was made as a part of the showing in the new supplemental bill tendered.

The court in denying the right to file the supplemental bill did so upon the same grounds forming a basis for his denial of the first petition to file a supplemental bill. It is not believed that the decision of the court was at all applicable to the second supplemental bill for the reasons that the allegations are wholly different in the second from the first as the first contained no reference whatever to any scheme to, by means of fraud and conspiracy, avoid the force and effect of the federal decree in the Oliver Hill case, while pretending to comply with it.

For that reason it seems to us clear that the trial court erred in denying the right to file the second supplemental pleading. (See last decision of Trial Court, pages 104-105, Order of Court, pages 105-166, Tr., to which exception was allowed).

An examination of the amended complaint and complaint in intervention in the Oliver Hill case, sent up as exhibits by the clerk, discloses that the controversy in the original case was over the right to sell more water than was available for the land and for the enforcement of the state contracts. The federal court decreed that the state contracts should be enforced and that no further rights beyond 170,-000 acres should be sold unless the parties should agree that they could do so "without violating the settlers' contracts." McClung sets up in his supplemental bill that the parties did agree that they could

do so "without violating the settlers' contracts" but in coming to that conclusion they acted fraudulently and as a result of a wrongful and unlawful conspiracy between themselves so as to override the force and effect of the federal decree while claiming to comply with it, and he set out in what way the federal decree would be violated; namely, on the ground that there was not sufficient capacity nor water to supply the 170,000 acres, much less more.

But we are confronted with the proposition that there was another suit pending to cancel this contract by the supplemental complainant, and that is his defense. In the first place, that case was never tried in the trial court, by agreement, pending a decision in what is known as the Vinyard case by the Supreme Court of the State of Idaho. The Vinyard case was decided just a few days ago and will be brought to the attention of this court as soon as reported wherein the Supreme Court of Idaho held that there is a water shortage on the North Side project of 155,000 acre feet on the second and third segregations alone, and if there were a shortage, and the court so held, why should 15,000 additional shares more representing 15,000 additional acres be sold? Certainly it cannot be done without violating the federal decree and without violating the settlers' contracts.

RELATION OF SUPPLEMENTAL BILL TO ORIGINAL CASE.

As heretofore stated, the original action was to prevent the selling of more water rights than there was water. The supplemental bill alleges a scheme for accomplishing that very purpose but in direct violation of the decree of the court by pretending to comply with it, hence it must be germane for it relates directly to the same subject. It seems to us that when the trial court holds the subject matter of the second supplemental bill as being germane and denies the right to file upon that ground it clearly committed error.

A supplemental bill is an independent aid to the original decree of the court.

Simkins Federal Practice Revised Edition, pp. 634-635.

And it will be allowed as readily after decree as before.

Simpkins Federal Practice Revised Edition, p. 637.

New parties may be brought in.

Simkins Federal Practice Revised Edition, pp. 640-641.

The supplemental bill is merely a continuation of the original and is only required to relate to it.

Simpkins Federal Practice Revised Edition, p. 642.

Then we have bills in the nature of supplemental bills.

Simkins Federal Practice Revised Edition, pp. 644-646.

In the citations above given an exhaustive treatise of the subject will be found.

ADJUDICATION OF MERITS

We urge that when the trial court found that the parties had pursued the remedy provided for in the federal decree in the original case entitling them to sell additional water rights, a final adjudication of the matter on the merits was in fact had and made by the trial court.

In Rosemary Manufacturing Company v. Halifax Cotton Mills, Inc., 266 Fed. 363, the Circuit Court of Appeals for the Fourth Circuit laid down the rule:

> "The trial court will be considered to have abused this discretion when the appellate court is clear in its own conviction that the action of the trial court was based on a material error of law, or will result in denial of a fair trial in a matter of consequence for which the moving party can have no adequate redress in another proceeding.
>
> If the District Court in the case before us had refused to allow the supplemental bill to be filed solely on the ground that the device in the

> suit did not show invention, and the plaintiff had no other remedy, we think the order would be appealable."

It seems to us that an examination of the decision of the trial court clearly disclosed two things. First, that the trial court considered the motion to file the supplemental bill and the supplemental bill on the merits of the controversy, and rendered a final decision which may be set up as a bar to any future action if the judgment of the trial court stands. Why? For the reason that the trial court judicially determined upon the showing made, and all the showing was made that can ever be made, that the parties found they could sell additional water rights without violating the settlers' contracts and that in so finding they have not run counter to the original federal decree; and thus the trial court adjudicated and determined that the parties had followed the course set out in the federal decree for arriving at that matter, and that we are in no position to complain of it. This being true, it does seem to us that that is a final determination of the matter and we fear may be set up as a bar to any future suit involving that point.

We fully realize that the matter of refusing to permit a supplemental bill to be filed rests in the discretion of the trial court, but that discretion, all of the decisions recognize, may be abused and we urge in this particular instance that it was so abused.

In the very late case of United States v. Carbon County Land Co. et al, the Circuit Court of Appeals for the Eighth Circuit, 9 Fed. 2d Edition 517, reversed the District Court for the District of Utah in refusing to permit a supplemental bill to be filed, and in column 1 at page 519, said:

> "The suit is in aid of the former decree, to obtain the benfits of that decree. As to Carbon County Land Company, it is a supplemental bill, or (more properly according to Story) an original bill in the nature of a supplemental bill, and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required, and it may be filed either before or after a decree. Root v. Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123; Shields v. Thomas, 18 How. 253, 262, 15 L. Ed. 368; Thompson v. Maxwell, 95 U. S. 391, 399, 24 L. Ed. 481; Story's Equity Pleading 338, 339, 345, 351b, 355, 429, 432. Cooper on Equity Pleadings says (pages 74, 75):
>
> "But a supplemental bill may likewise be filed for the purpose of stating events which have happened subsequent to the decree. * * * But this bill though it is supplemental in respect of the old parties and the rest of the suit, yet to any new party brought before the court by it, and consequently in regard to its immediate operation, it has in some degree the effect of an original bill."

The same authority, on page 98, in reference

to bills, not original, to carry a decree into effect, says:

> "The necessity for this kind of a bill generally arises where persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights under it have become embarrassed by subsequent events. * * It may be brought by or against a person claiming as assignee of a party to the decree. So an original bill to execute a decree against a purchaser who claimed under parties bound by that decree, was allowed to be a good bill on demurrer.' "

The supplemental complainant, among other things, prayed that an order for process be issued and the North Side Canal Company be brought in as a party defendant and that the Land & Water Company be restrained from further selling of shares and be required to complete the system so as to furnish water for 170,000 acres.

In referring to the provisions of the original decree providing that the parties may agree upon selling further water rights, and in the event they cannot agree, an action be brought in a court of competent jurisdiction, the trial court said:

> "There is no dispute as to the execution of the agreement referred to. It would seem that at the present time there is no question under the decree to be adjudicated, as the parties have agreed in the manner directed in the decree." (Page 49 Tr.).

It would seem that when Judge Dietrich made provision for an agreement between the parties to sell further shares, he did so contemplating that the parties would act in good faith and would not enter into an agreement as a result of an unlawful conspiracy to cheat and defraud the then existing stockholders of the North Side Canal Company. Now when we set out a contract in the second application to file a supplemental bill in which it is alleged that the contract was made for the very purpose of avoiding the provisions of Judge Dietrich, it would certainly seem that the issues raised in the supplemental bill cannot be said to be not germane but directly relate to the original complaint and to the decree founded upon it, and that the trial court did abuse its discretion and did pass upon the merits of the controversy adversely to the supplemental complainant. And finally, we urge upon this court that the order of the trial judge should be reversed and the supplemental complainant should be given opportunity to present his case.

It seems clear that when the McClung case is brought on for trial in the state court involving different issues and between different parties, we may be confronted with the decision of Judge Cavanah that insofar as McClung is concerned, it was determined by the Federal Court that the remedy provided in the Judge Dietrich decree was followed, and

that that was finally determined and is res adjudicata as to him.

It would seem without argument clear that it is the duty of courts to protect their own jurisdictions and their own decrees from any wrongful and unlawful schemes for the purpose of thwarting and defeating them.

It will be noted that in the objections it was contended that McClung was not a party for whom the original complaint in intervention in the original case was made, but Judge Walters in his affidavit did not make that contention, hence that point certainly should not be considered if otherwise available for there is nothing in the record to support it. McClung in his verified supplemental bill set out how and why the action was brought for him under which the original federal decree was rendered, and that should prevail against no showing whatever to the contrary.

But we are again told that there is another action pending in the state court. It will be remembered that the original case was decided in the the Federal Courts, long before the McClung case was filed in the state court and it is clear that the Federal Court has never lost its jurisdiction to enforce its decree by means of supplemental bill. That the trial court found to be the case. Hence the fact that McClung filed a case in the state court involving different par-

ties which has been pending the outcome of a case in the Supreme Court, conducted by Vinyard, involving water rights on the North Side project, which case has just been decided and, as heretofore stated, a large water shortage found to exist, is no reason why a supplemental bill should not be allowed in the original case.

Adverting to Rosemary Manufacturing Company v. Halifax Cotton Mills Company, Inc., supra, 266 Fed. 363, the doctrine laid down in that case is applicable here, we believe, to the effect that an abuse of discretion will be considered and for the purpose of illustrating the difference between abuse and non-abuse of discretion. The court in that case said at page 364:

> "The District Court refused the application for leave to file the supplemental bill, saying its refusal was 'mainly because of its belief that the accomplishment of plaintiff's assignor (the patentee) does not show invention.' "

Then the court further says that the holding that the "supplemental bill does not show invention" is not an adjudication of that point or of its merits in any respect. With this we fully concur for the reason that the court did not say that there is and was no invention, *but merely that the supplemental bill did not show it;* while in the case at bar the trial court said that in making the contract for the sale of 15,000 additional acres the original decree of the

Federal Court was complied with and that no further litigation was necessary. This was an absolute determination, it seems to us, of the point involved; namely, did the parties in spite of the allegations of the supplemental bill comply with the decree of the court when they made the contract for a further sale of water rights, or was it done as a result of a wrongful scheme to avoid the effect of the original decree of the Federal Court while pretending to comply with it?

The trial court, it seems to us, adjudicated that the original decree was complied with when the contract was made thereby determining the matters on the merits without taking testimony, without leave to file a supplemental bill, and in derogation of every rule forbidding the trial on the merits of a controversy on application to file a supplemental bill, and therefore we urge a clear abuse of discretion.

Respectfully submitted,

J. B. ELDRIDGE,

Solicitor for Appellant.